

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL  
Commissioner

**Nov. 12, 2015**

GEORGINA CUDJOE v. WALMART ASSOCIATES INC  
NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier  
CLAIMS MANAGEMENT INC, Claim Administrator  
Jurisdiction Claim No. VA00000924804  
Claim Administrator File No. C4475182  
Date of Injury May 14, 2014

Bryan G. Bosta, Esquire  
For the Claimant.

Evans G. Edwards, Esquire  
For the Defendants.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's July 7, 2015 Opinion finding she failed to give timely notice of her left knee injury and failed to offer reasonable justification for the delay in giving notice. We AFFIRM.

**I. Material Proceedings**

The claimant's March 10, 2015 claim alleged injuries by accident to her left shoulder, left leg, left knee and left ankle on May 14, 2014. She sought a medical award and temporary total disability benefits beginning December 31, 2014 and continuing.

The defendants agreed the claimant sustained compensable injuries by accident on May 14, 2014, resulting in injuries to the left ankle, left hip and left shoulder. They agreed she received causally related medical treatment to the left ankle, left hip and left shoulder. The Deputy Commissioner's Opinion entered a medical award for these injuries.

The claim was defended on grounds that the claimant failed to give timely notice of the left knee injury, there was no causation between the accident and the left knee injury, and she had no causally related disability after Dr. Zeigler released her to full duty on May 21, 2014. Defendants stated the claimant's treatment with Dr. Pablo-Bustos, Dr. Reeves and Dr. Herzenberg was unauthorized.

The Deputy Commissioner heard the testimony of the claimant<sup>1</sup> at the hearing. Jay Mahramas, her supervisor, testified by de bene esse deposition.<sup>2</sup>

The Deputy Commissioner found the claimant failed to provide notice of the left knee injury in accordance with the Act. She explained:

Va. Code Ann. §65.2-600 requires the claimant to provide written notice of an injury by accident to the employer or its representative within 30 days of its occurrence. Where the employer, foreman or other employee superior to the claimant has actual knowledge of the occurrence of the accident within a reasonable time thereafter and no prejudice to the employer's rights is established by the evidence, the notice provision has been satisfied. Uninsured Employers' Fund v. Edwards, 32 Va. App. 814, 531 S.E.2d 35 (2000).

This section specifically provides that any defect or inaccuracy in the notice provided by the claimant shall not be a bar to compensation absent proof by the employer that its interests were prejudiced thereby. The burden is upon the employer to show that it has been prejudiced by the failure to provide notice. Maryland Casualty Company v. Robinson, 149 Va. 307, 141 S.E. 225 (1928); Redford v. Stafford County School Board, 79 OWC 85 (2000). However, this burden does not arise until the claimant has demonstrated reasonable justification for the failure to provide notice within the 30-day time frame. Id.; Hughes v. Mark Winkler Management, Inc., 66 OIC 62 (1987).

Here, we find that the claimant has not provided reasonable justification for the failure to provide timely notice of her left knee injury sufficient to shift the burden to the employer to demonstrate prejudice. The July 29, 2014 letter signed

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<sup>1</sup> The claimant's testimony was translated from Fante, a language of Ghana, to English. There was no allegation a language barrier caused difficulty reporting the accident and injuries.

<sup>2</sup> Mahramas testified he would be unavailable on the hearing date due to a long-planned vacation outside Virginia.

by claimant's husband, Victor Blay, does mention the left knee and treatment therefor. But no specific correlation between the left knee treatment and the accident was referenced in this letter (Claimant's Exhibit 2). Additionally, this letter was written well after the accident. Moreover, the claimant states that she does not recall when the left knee MRI was given to the defendants.

While it may be argued here that the burden to provide notice of the left knee injury was excused and/or did not arise until the claimant was aware of it, the July 29, 2014 letter reflects that she was aware of a left knee problem. Further, the claimant herself states that the first time that she knew of a left knee injury was at the time of the November 2014 MRI. She also acknowledged that she never told the defendants about her knee injury until her March 10, 2015 Claim for Benefits was filed with the Commission, well beyond 30 days from the date she claims to have been aware of the left knee injury. A party "cannot be heard to ask that his [her] case be made stronger than he [she] makes it." Massie v. Firmstone, 134 Va. 450, 462, 114 S.E.2d 652, 656 (1922). In applying this principle, we considered the testimony of the claimant and the effect thereof with all the other evidence in the case. Olsten v. Leftwich, 64 O.I.C. 199, 202 (1985).

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The Deputy Commissioner found the claims for temporary total disability and medical treatment related to the left knee injury were barred by the claimant's failure to provide notice. The claimant's total disability beginning December 31, 2014 and treatment by Drs. Pablo-Bustos, Reeves and Herzenberg were for left knee complaints.

The claimant filed a timely request for review. She acknowledges that she gave notice of the left knee injury more than thirty days after the accident. The claimant asserts that she was not required to give notice of every injury within thirty days of the accident. If she was required to give such notice, the claimant argues upon learning of her knee injury, she provided notice to the employer as soon as practicable. She asserts the Deputy Commissioner should have found she provided reasonable justification for failing to report the knee injury within thirty days, and therefore, the burden shifted to the employer to prove prejudice.

## **II. Findings of Fact and Rulings of Law**

We have carefully reviewed the claimant's claims, exhibits, hearing testimony, deposition testimony of the claimant and Jay Mahramas, the medical evidence, the Opinion, the Request for Review and the parties' Written Statements. We incorporate by reference and adopt the Deputy Commissioner's summary of the medical evidence and testimony as if our own.

Va. Code § 65.2-600 requires an injured employee to give notice immediately or as soon as practicable after an accident. Pursuant to Va. Code § 65.2-600 (B), the notice must include the employee's name and address, the time and place of the accident, and "the nature and cause of the accident and the injury."

The claimant did not note or report any left knee symptoms immediately after the accident. She treated with Dr. Ziegler at Urgent Care for her left shoulder, hip and ankle injuries on May 14, 2014 and May 21, 2014. She was then released to full duty. At a June 30, 2014 visit, which referred to the history of the work accident and a complaint of left chest pain, her personal physician, Dr. Pablo-Bustos, noted the claimant had not seen an orthopedist for evaluation of her lower extremity. When the claimant saw Dr. Reeves, orthopedist, on July 9, 2014, about eight weeks after the work accident, she complained of left knee numbness, tingling and instability since an injury.<sup>3</sup> Dr. Reeves noted the claimant had a crooked left leg since a surgery in Ghana at age 15. He opined she had osteoarthritis of the knees and valgus deformity of the tibial shaft. He referred the claimant to a specialist in Baltimore.

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<sup>3</sup> The report says the injury occurred on June 2, 2014, but the claimant denied any incident on that date. (Tr. 44.)

The Commission received a July 31, 2014 claim<sup>4</sup> from the claimant accompanied by a letter from the claimant's husband mentioning further evaluation for the left knee without attributing the knee condition to the accident. The accompanying claim form indicated injuries of left ankle sprain, hip contusion and left shoulder contusion due to the accident. The claimant sought payment of medical bills and authorization for a referral to a doctor in Baltimore. The Commission forwarded a 20-Day Order to the claim administrator and insurer on August 8, 2014. The Deputy Commissioner took judicial notice of all claims filed.

"The requirement of notice necessarily implies knowledge of the injury for which claim is made." Lucas v. Research Analysis Corp., 209 Va. 583, 585, 166 S.E.2d 294, 296 (1969). An employer's burden to prove prejudice due to late reporting of an injury does not arise until the claimant has established a reasonable excuse for her delay. Id. at 586, 166 S.E.2d at 296.

We find the evidence preponderates that the claimant was aware of a left knee injury she attributed to the accident long before she reported any left knee injury to the employer. She testified she noticed pain in her knee after her last visit at Urgent Care. Dr. Ziegler released her to full duty on May 21, 2014. She never returned to report this complaint. The claimant consulted Dr. Pablo-Bustos, her primary care physician. She testified she told Dr. Pablo-Bustos she fell and now felt knee pain. Dr. Pablo-Bustos referred her to Dr. Reeves, where the claimant complained of left knee injury on July 9, 2014. Dr. Reeves referred her to Dr. Herzenberg.

The claimant testified she relates her left knee problems to the injury at work in May 2014. (Tr. 42) She testified she never mentioned a specific injury to her left knee to anyone with

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<sup>4</sup> This and other claims were later withdrawn. The Deputy Commissioner signed a January 5, 2015 Order permitting withdrawal of claims filed May 28, 2014, June 16, 2014, and July 31, 2014 without prejudice.

the employer until after she saw Dr. Herzenberg. The claimant testified she gave her employer her left knee MRI, but she did not recall when she did this. She appeared uncertain when she reported the injury, also testifying she did not know of an injury until November 2014.

Dr. Herzenberg first saw the claimant on September 18, 2014. She was referred for a left knee MRI on November 10, 2014. Dr. Herzenberg and his physician assistant reviewed the MRI on December 8, 2014 and advised the claimant that it showed meniscal injuries. The report discussed a planned surgery to correct her left leg deformity and stated a plan to recruit a joint physician to perform an arthroscopic surgery at the same time. They warned the claimant the surgery scheduled for December 31, 2014 might have to be rescheduled if a joint physician was not available then. The claimant underwent surgery on December 31, 2014.

The claimant's March 10, 2015 Claim for Benefits added a claim for left knee injury.

Based upon the evidence as a whole, we find the claimant failed to offer reasonable justification for her failure to make a timely report of a left knee injury. The claimant was aware of a left knee injury by no later than July 9, 2014. She agreed she did not notify the employer of her injury until after September 18, 2014. The claims for left knee injury and treatment are barred by the claimant's untimely notice.

### **III. Conclusion**

The Deputy Commissioner's July 7, 2015 Opinion is AFFIRMED.

This matter is hereby removed from the review docket.

### **APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of

Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.